

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 312A/07
5092287**

BETWEEN F FABBIAN LIGHTING (NZ)
LIMITED
Applicant

AND STEFANO LA CAVA
First Respondent

MELITO INVESTMENTS LIMITED
Second Respondent

Member of Authority: Leon Robinson
Representatives: Stephen Langton for Applicant
Simon Mitchell for Respondents
Investigation Meeting: Consideration on Papers
Determination: 31 October 2007

**DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTER
(No 2)**

The problem

[1] By a joint memorandum of counsel dated 24 October 2007 the representatives ask the Authority to remove "this proceeding" to the Employment Court.

The facts

[2] By a statement of problem lodged in the Authority on 2 July 2007 the applicant asked the Authority to determine its former employee the first respondent, acted in breach of express and implied terms of his employment agreement and also contrary to his statutory obligation of good faith. The applicant further sought penalties against both respondents.

[3] Contemporaneously with the lodgement of its application for investigation, the applicant urged the Authority to issue summons compelling the first respondent to attend before the Authority and produce certain information and documents. The applicant further sought an order from the Authority that the first respondent be

required to permit access to computer hard drives so that they could be cloned by a forensic computer investigator.

[4] By a direction dated 3 July 2007 the directions sought by the applicant were granted by the Authority as appropriate in the circumstances.

[5] The Authority subsequently received a report from a computer forensic investigator together with the results of the computer cloning. By Minute of 24 July 2007 I directed the parties to mediation and made request to meet with the representatives to discuss the documentation that had been gathered and to make arrangements for its access.

[6] At a meeting with me, the representatives could not agree that mediation or arrangements to have the matter scheduled for investigation meeting were appropriate.

[7] Despite a considerable period of time and as it turns out misplaced faith in responsible counsel to do so, they were unable to reach agreement as to the documentation which should be made available.

[8] The first respondent urged the Authority to decide as a preliminary issue, the date of termination of his employment. That issue was disposed of in a determination dated 5 October 2007 which was challenged by statement of claim dated 17 October 2007 and filed in the Employment Court Auckland registry on 23 October 2007.

[9] On 23 October I directed the parties to mediation and instructed the support officer to fix a date for investigation meeting.

[10] The representatives by joint memorandum dated 24 October 2007 now ask the Authority to remove "the matter" to the Employment Court.

The grounds for removal

[11] There are three grounds for removal. The first is that the Employment Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues. This refers to the challenge to the Determination of 5 October 2007.

[12] Next it is said there is an important question of law which arises other than incidentally, namely, whether an employee's implied duty of fidelity is diluted by virtue of that employee having had previous relationships with an employer's suppliers and/or clients.

[13] Finally, it is respectfully submitted that the Authority should exercise its discretion in all the circumstances that the Court should determine the matter.

The legal principles

[14] Parliament has provided that some cases may be removed to the Employment Court for hearing and determination at first instance rather than being investigated conclusively by the Authority. Such cases are those which meet the criteria set out under section 178 of the *Employment Relations Act 2000* ("the Act"). That section is as follows:-

178. Removal to Court

(1) *Where a matter comes before the Authority, any party may apply to the Authority to have the matter, or part of it, removed to the Court for the Court to hear and determine it without the Authority investigating the matter.*

(2) *The Authority may order the removal of the matter, or any part of it, to the Court if—*

(a) *an important question of law is likely to arise in the matter other than incidentally; or*

(b) *the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court; or*

(c) *the Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues;*
or

(d) *the Authority is of the opinion that in all the circumstances the Court should determine the matter.*

(3) *Where the Authority declines to remove any matter, or a part of it, to the Court, the party applying for the removal may seek the special leave of the Court for an order of the Court that the matter or part be removed to the Court, and in*

any such case the Court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).

(4) An order for removal to the Court under this section may be made subject to such conditions as the Authority or the Court, as the case may be, thinks fit.

(5) Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the Court, the Court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.

(6) This section does not apply—

- (a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and
- (b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.]

[15] In determining this application I have also had regard to the principles set out in the judgments of the Employment Court in *McAlister -v- Air New Zealand Limited*, *Auckland District Health Board -v- X (No 2)*¹, *Rooney Earthmoving Limited -v- McTague and others*², and *Abernethy -v- Dynea New Zealand Limited*³.

[16] In *Rooney*, the Chief Judge commented *obiter* on the appropriateness of the Authority considering the causes of action in the present substantive matter. His Honour stated at paragraph [49]:-

But I question seriously the appropriateness of such a case being considered first in an investigative body that has the role of resolving employment relationship problems according to the substantial merits and equities of the case without regard to technicalities (s157(1)) and whose aim is to promote good faith behaviour and support successful employment relationships (s157(2)).

The merits

[17] As for the now contended important question of law likely to arise other than incidentally, I first note such question only now emerges, some time after it ought to have been apparent to the parties.

[18] The ground is premised on this pleading:-

The First Respondent says that effectively all the Applicant's distributors and clients were as a result of introductions to the Applicant by the First Respondent.

¹ [2005] 1 ERNZ 551, Colgan CJ

² unreported, CC7/07, 11 May 2007, Colgan CJ

³ unreported, CC13/07, 10 July 2007, Colgan CJ, Travis and Shaw JJ

[19] While I accept the statement of principle I am referred to in *Hanlon*, I am not persuaded that the question of law submitted is either an important one as that notion has been applied or that it arises other than incidentally. So I decline to remove the matter on this ground.

[20] The narrative above of the steps to date evidences advanced steps of investigation. I have little doubt not insignificant costs of counsel have also been incurred. I consider the steps taken to date in the investigation are sufficiently advanced so as to be a material consideration as to whether to exercise the discretion to remove the matter.

[21] Note the statement of the learned authors of *Brookers Employment Law* at paragraph 178.04(4) as follows:-

Section 178(1) envisages that any application for removal should be made before the Authority commences its investigation, or certainly early in the process. Therefore where a matter is substantially complete the Authority is unlikely to order removal

[22] The Employment Court in *Auckland District Health Board -v- X (No 2)* said this about the phrase "*without the Authority investigating the matter*":-

Use of that phrase does not fix in time when an application can or cannot be made. Rather, the phrase is intended to convey that a matter removed will not require an Authority investigation or certainly a concluded Authority investigation so that it will, in effect, be heard by the Court at first instance.⁴

[23] The Chief Judge points out the Legislature did not state "*before the Authority investigates the matter*". But His Honour also said this:-

I accept that there must come a time when the Authority's investigation of an employment relationship problem is so advanced that it would be a proper exercise of the discretion not to remove under s178(2) even where one of the four particular grounds for removal have been established.

⁴ per Colgan CJ at paragraph [21]

[24] That statement is my assessment of the status of the Authority's present investigation. I consider the steps taken to date sufficiently advanced so as to preclude removal.

[25] In my determination of 5 October 2007 concerning these parties, I said this:-

*This determination ... is not a final disposition of the substantive employment relationship problem between the parties*⁵.

[26] That determination has now been challenged by proceedings numbered ARC67/07 in the Employment Court's Auckland Registry. I consider those proceedings to involve the "same or similar or related issues" to those of the Authority's investigation. Because it has been held that applications such as the present are not fixed in time by the legislation, it must also follow that the time at which the same, similar or related proceedings are before the Court is also not fixed.

[27] Accordingly, because the Employment Court has before it the challenge to the Determination of 5 October 2007, I exercise my discretion to remove the matter.

The Determination

[28] For the reasons stated above, I order the removal of this matter to the Employment Court.

Costs

[29] I am not asked to deal with costs.

Other directions

[30] If there are any consequential orders or directions necessary, either party may make application for the same within 10 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority

⁵ at paragraph [1]